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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 58

JOHN E. HODGES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* majority, and dissenting opinions in the court of appeals (R. 148–161) are reported at 282 F. 2d 858. The opinion of the district court (R. 6–8) is reported at 156 F. Supp. 313.

JURISDICTION

The judgment of the three-judge division of the court of appeals was entered on December 30, 1959 (R. 141). A petition for rehearing was granted on April 15, 1960, and the case was set for rehearing *en banc* (R. 146–147). The judgment of the court of appeals, on rehearing *en banc,* was entered on July 21, 1960 (R. 162). The petition for a writ of certio-

rari was filed on September 14, 1960, and was granted on February 20, 1961 (R. 164). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a proceeding under 28 U.S.C. 2255, petitioner may collaterally challenge, on the ground of involuntariness, the admission of his own confession at the trial—where the issue of voluntariness was initially passed upon by the judge at the trial and then submitted to the jury for resolution on sufficient evidence.

2. Whether, if the admission of the confession into evidence would not otherwise be open to collateral challenge under 28 U.S.C. 2255, it is rendered cognizable in such a proceeding by petitioner's present allegations that his trial attorneys' recommendation for an appeal, made to petitioners' wife on the date of sentence, were not seasonably transmitted to him and that he did not know that notice of appeal was required to be filed within ten days.

STATUTE INVOLVED

The pertinent provisions of 28 U.S.C. 2255 provide:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move

the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

* * * * *

STATEMENT

I

THE TRIAL

In the United States District Court for the District of Columbia, petitioner, his brother Frank A.

Hodges, and Thomas A. Stramer, were charged with the robbery of $4,950, on July 30, 1955, from the cashier of Briggs and Company, in Washington, D.C. (R. 3, 23, 68, 133). On August 30, 1956, petitioner pleaded guilty (R. 3) and was sentenced to a term of 3 to 12 years (R. 1) but on February 7, 1957, he was allowed to withdraw his plea of guilty (R. 1–3).[1] He was tried, commencing on April 10, 1957 (R. 23). A verdict of guilty was returned on April 15, 1957 (R. 151, fn. 4). On May 3, 1957, petitioner, appearing in person and by his two attorneys, was sentenced to a term of 4 to 13 years (R. 1). No notice of appeal was filed.

A. *The hearing on the confession (out of the jury's presence).*

At the trial, before petitioner's confessions, first to police officers and then to the company cashier, were admitted into evidence, the judge conducted a hearing out of the presence of the jury.

1. The following is a summary of the testimony of government witnesses and of the undisputed portion of petitioner's testimony and that of his wife:

At a time prior to July 30, 1955, the date of the robbery, petitioner had been a route salesman for the Briggs Company (R. 23, 67, 76). He was 27 years of age in 1955 and had had a high school education (R. 78). The two men who actually entered the

[1] This was after two *pro se* motions (on file with the Clerk of this Court) for reduction of sentence and to vacate the sentence. Counsel was appointed on the latter motion and thereafter permission to withdraw the plea of guilty was granted.

Briggs company and seized the money at gun-point were identified by the cashier, Parks, as Frank Hodges (petitioner's brother) and Stramer (R. 24).

On April 23, 1956, on the basis of an informant's naming of the three participants, Washington police obtained warrants for their arrest (R. 35–37; and see R. 98–99). Stramer was arrested first. He told the police that petitioner had waited outside in a stolen get-away car and had divided the stolen money with the two who made the entry (R. 36).

A warrant for petitioner's arrest was forwarded to Tampa, Florida, and on April 28 or 29, 1956, the Washington police learned that petitioner had moved to Chicago (R. 36–37). The Chicago police were informed that petitioner was wanted for the robbery and that he was shortly to receive a telephone call at a certain number (R. 25). By means of the telephone number, the Chicago police located petitioner's apartment (R. 25). They went there at about 6:00 o'clock on Sunday evening, April 29, 1956, but did not find him at home until about 9 p.m. (R. 26, 29, and see 87–88). Petitioner admitted them peaceably (R. 30). When the Chicago police arrested petitioner, they told him that he was wanted for robbery in Washington and that an arrest warrant was being sent from Washington (R. 26). Petitioner knew that he was entitled to have a lawyer, having had one in "[s]everal cases" (R. 66, 78, 80–81), but said he did not think about it at the time (R. 66). He expressed willingness to return to Washington voluntarily (R. 28, 70). The arresting officer asked petitioner if he had any

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guns and, if so, where they were. He was directed by petitioner to a suitcase where police found a .32 caliber revolver and ammunition for a .38 caliber revolver (R. 25–26, 67–68).

Pending receipt of the warrant of arrest, petitioner was taken to the Detective Bureau lockup in Chicago (R. 26, 28), arriving there at about 9:30 p.m., on April 29th (R. 26). The arresting officer had some conversation with petitioner as to whether he had committed the robbery and how his address had been learned, but did not investigate the robbery. He had no assignment for such investigation (R. 32–33). The arresting officer did not know whether petitioner was placed in a lineup, but testified that the general procedure was to place people from the lockup in the lineup for possible identification (R. 34). Petitioner admitted that the lineups did not involve excessive lights and that there was "not a word" of questioning (R. 70–71). The line-ups were for the purpose of identification with respect to local crimes (R. 68, 70).

On the next day, Monday, April 30, 1956, at about 5 p.m., the Washington police officer investigating the case received notice at his home of petitioner's arrest in Chicago (R. 37, 46, 104). He did not learn of petitioner's willingness to return voluntarily until the following day, Tuesday, May 1, 1956 (R. 50). On that day, Chicago police received the arrest warrant that had been sent from Washington and at about 1:30 p.m. brought petitioner before the Chief Justice of the Criminal Court in Chicago, where he formally waived extradition and was placed in the custody of

the Sheriff of Cook County pending arrival of the Washington police (R. 26–27, 61). In addition, a commissioner's warrant for petitioner had been obtained in Washington on the morning of May 1, but this warrant was not used (R. 107).[2] The Washington police officers admitted that they preferred having custody themselves so that they could question petitioner (R. 47–48, 50).

The two Washington police officers left for Chicago by plane at 8:00 a.m. on Wednesday, May 2, 1956, and interrogated petitioner at the Robbery Squad headquarters in Chicago that afternoon. He was informed that he was not required to make a statement, and that any statement he made could be used in court. He at first denied participation in the robbery but, when he was informed of his brother's confession and that of Stramer, he told his version of the robbery, which was taken down on the typewriter by one of the officers (R. 40–42, 47, 77–78). The statement was completed at 3:35 p.m. and petitioner was returned to a cell block while the officers arranged for transportation to Washington. Petitioner and his brother agreed to plane travel, which required a delay until the next day for a block of four reservations (R. 42, 79). Petitioner was not interrogated further at the time or on the plane trip to Washington (R. 43, 79). He was, in the words of his own testimony, at all times treated "very nice" by the two officers, and was never abused by them (R. 76–77).

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[2] Washington police did not have authority to send such a warrant to Chicago; that would be the marshal's responsibility (R. 108).

The flight to Washington and transportation to police headquarters there required until about 4:30 or 4:45 of the afternoon of Thursday, May 3, 1956 (R. 44). Cashier Parks, of the Briggs company, was present at headquarters, and upon request of the officers petitioner read the confession to him and again signed it in Parks' presence. Petitioner said nothing to Parks about the confession being untrue and made no complaint about his treatment by the Chicago police as evoking the confession (R. 44–45, 74).

Thereafter, until about 6:30 p.m., petitioner was put through the Identification Bureau procedure, *e.g.*, fingerprinting, photography, and was then placed in a cell block at police headquarters (R. 45, 65). On the next morning, at about 9:30 or 10 a.m., he was arraigned (R. 46, 65).

2. Petitioner and his wife, testifying in the absence of the jury, said that the officers entered their Chicago apartment with drawn guns and without permission (R. 51–52, 57). Petitioner testified that the officers said they had a warrant (R. 68); but compare R. 125 (before the jury), "they said they had some warrant coming down". He said that the Chicago police questioned him four times about the robbery, urging him to confess, the longest periods up to 30 to 45 minutes, and that on three occasions they placed him in a line-up of ten or fifteen minutes duration for possible identification for local offenses, including one lineup at 2:30 in the morning (R. 57–61, 71). He did not attempt to telephone for a lawyer, but once asked to telephone his wife and was denied permission to do

so (R. 61). Petitioner's wife testified that, when petitioner was arrested, the Chicago police would give her no information but one officer "slipped" her a telephone number to call which proved to be a police precinct (R. 52–53). She did not learn until Wednesday (May 2) that he was in jail and then was told that there was no point to her coming down since petitioner was to be extradited (R. 53).

Petitioner said that he made no admissions to the Chicago police (R. 71). He testified (on cross-examination, not direct)[1] that Chicago police, on three occasions, "roughed" him up a little bit with their hands; that they hit him in the stomach, and slapped him on the back of the neck, and the side of the head. With respect to the only Chicago officer present at the trial, Officer Fitzgerald, who had taken him into custody, petitioner made no such accusation (R. 72). He testified that when he first told the Washington police that he would not sign a confession they said that they would have to turn him back to the Chicago police (R. 73, 80).

3. Upon the conclusion of this testimony outside the presence of the jury, the trial judge ruled that the confessions were admissible. He ruled that there had not been substantial credible evidence of improper arrest or of unnecessary delay in arraignment to render the confessions inadmissible as a matter of law and that he would submit to the jury the issue of whether the confessions were voluntarily made (R. 82).

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[1] He did not repeat the accusation when he testified before the jury.

B. *The trial testimony and the instructions to the jury on the voluntariness of the confessions.*

1. The testimony on the voluntariness of the confessions presented to the jury was substantially as given before the judge (R. 83–132), but petitioner did not repeat his prior assertion that Chicago police "[r]oughed [him] up a little bit" (see *supra*, p. 9). Petitioner testified that he slept on the floor on May 1st in the Cook County jail, but that he was not singled out in this respect ("No bed available. More than me sleeping on the floor. Not just me" (R. 122)). There was testimony that, at the time of the arrest, Chicago Officer Fitzgerald told petitioner he could get a lawyer in Chicago if he chose not to waive extradition (R. 94–95).

Petitioner, before the jury, did not mention one alleged 2:30 p.m. questioning by the Chicago police on April 30 to which he had testified in the absence of the jury (R. 60), and he added one 7:00 p.m. questioning (R. 119–120) and two additional appearance in lineups at 1:30 p.m. and 2:00 a.m., respectively (R. 119–120).

2. The trial judge included in his charge to the jury the following instructions concerning the confessions (R. 139–140):

> The law does not admit, however, a confession taken by duress, by coercion, by force, or as a result of an inducement or as a result of getting a person to make him confess.
>
> In that connection the Court further instructs you that a confession, if you so find this confession to have been, obtained by these means, must be rejected and disregarded by the jury.

Human experience has also shown that it has happened that persons have admitted the commission of a crime when they have not in fact committed it, as a result of force which has been exerted against them.

In other words, I repeat, human experience has shown that it has happened a person has admitted the commission of a crime which they have not in fact committed, as a result of force exerted against them.

If you find that the defendant Hodges' confession was made under duress and obtained by coercion and force or by inducement or promises or by baiting him, then you must disregard the confession.

If the jury has a reasonable doubt as to whether the confession was voluntary, then they must reject it.

In other words, you are the exclusive judges of all of the facts surrounding this alleged confession which the officer said he obtained from the defendant.

If it was a voluntary confession as I have explained the meaning of that word, then you may accept it. If it was involuntary or made for any reason which I have included in the charge, then it must be rejected.

Is that satisfactory to counsel?

Mr. CAREY [defense counsel]: Yes.

II

THE PROCEEDINGS UNDER 28 U.S.C. 2255

A. *In the district court.*

On August 20, 1957—about 3½ months after sentencing—petitioner filed a motion under 28 U.S.C.

2255, by two newly engaged attorneys, in which it was alleged that he was "questioned continuously, beaten physically and subjected to psychological as well as physical torture" by the Chicago police, "with the result that he made a statement demanded by the Chicago police but refused to sign it" and that petitioner had waived extradition and made a confession to Washington police under their "threat of handing him back over to the Chicago Police for further mistreatment and abuse." He alleged that his rights under the Constitution and laws were violated (citing *inter alia,* Rule 5 of the F.R. Cr. P., *McNabb* v. *United States,* 318 U.S. 332, and *Mallory* v. *United States,* 354 U.S. 449). No complaint was made as to petitioner's former counsel, either in their conduct of the trial or with respect to any failure to advise or take an appeal from the judgment of May 3, 1957 (R. 1–3). The government, in opposition, urged that issues with respect to the sufficiency of evidence must be raised by appeal rather than under 28 U.S.C. 2255 (R. 3–5).

The order of the district court denying the motion recites that there was an oral hearing on October 25, 1957, with counsel on both sides present (R. 6). The court entered findings of fact[4] as to the time of petitioner's arrest and found also that the confession was voluntary and not coerced (R. 6). Its conclusions of law were directed to the contention of

[4] It does not appear on what these findings were based. There seems to have been no testimony taken at the hearing but merely argument of counsel. Presumably, the findings were based on the court's recollection of the trial and counsel's statements.

the defendant that the "confession which allegedly resulted from an unlawful detention invalidated the conviction and sentence" (R. 7). As to this, the court held that a motion under 28 U.S.C. 2255 is an "extraordinary remedy," not available for raising an error of law in the admission of evidence after lapse of the time for appeal (R. 7), and that the issue under the *Mallory* case was not a constitutional issue cognizable on collateral challenge (R. 8). Accordingly, the court denied the motion to vacate sentence (R. 8).

B. *In the court of appeals.*

Upon appeal from the denial of relief under 28 U.S.C. 2255, it was discovered (on May 18, 1959) that the notes of the hearing of October 25, 1957, had been lost. The court of appeals denied a motion to remand for rehearing and ordered the transcript *of the trial* prepared at government expense (R. 12–13), stating that "the issues on this appeal can be adequately determined by reference to the transcript of the trial proceedings" (R. 12).

On August 4, 1959, petitioner moved, *inter alia,* that the record be supplemented by adding the affidavits of petitioner and his trial counsel seeking to explain the failure to appeal from the conviction. The trial attorneys' affidavit alleged that petitioner's wife had requested them to defend petitioner; that neither petitioner nor his wife were able to pay a fee; that petitioner was found guilty on April 15, 1957, and sentence was imposed on May 8, 1957;[5] that imme-

[5] The actual date was May 3, 1957.

diately "after sentence" petitioner was removed from the courtroom and counsel "did not have an opportunity to talk to him"; that counsel did not "recall" discussing the "taking" of an appeal with petitioner, but after the sentencing proceedings they talked with petitioner's wife in the courtroom and advised her that counsel strongly felt that she should have petitioner prosecute an appeal; that she indicated that she would discuss it with petitioner and would suggest that he request court-appointed counsel to present an appeal; and that counsel did not learn until "some time" later, after time for appeal had expired, that petitioner had not taken an appeal (R. 15–16).

Petitioner's affidavit alleged that this was his first arrest other than for "minor traffic violations"; that he was "not versed in the law"; that he did not "recall" having any conversation whatsoever with "Edward L. Carey or John L. Kilcullen" (his trial counsel) concerning the taking of an appeal; that he did not know he had only ten days to appeal; that subsequently his wife visited him at Lorton Reformatory and "mentioned" an appeal; that it was "at this time" too late to file; that he did not know his wife's present occupation or address; that he did not find out "until later" the "actual" time limit within which to appeal. He said that this was when he discussed his legal situation with new counsel (Mr. Taylor) and retained him; and that he retained the new counsel as soon as he possibly could after he had been convicted and sentenced (R. 15). On August 28, 1959, the court of appeals denied, *per curiam,* the motion to supplement the record or to remand (R. 22).

On December 30, 1959, a three-judge division of the court of appeals sustained the district court's denial of relief under 28 U.S.C. 2255 (R. 141–146). In the court of appeals, the claim was that such relief was available because the confession was coerced (R. 142). The opinion of the panel was that "the right of appeal may not be abandoned and resort had to section 2255 whenever the conviction rests on evidence admitted at the trial in violation of a constitutionally protected right" (R. 145). The court noted that no reason was advanced for failure to appeal from the judgment and the "facts of the case do not lead us to hold that, nevertheless, justice requires that appellant should be granted relief" (R. 146).

A petition for rehearing was duly filed, and on April 15 , 1960, the court granted it and set the case for rehearing *en banc* (R. 146). Counsel were directed to discuss the following question (R. 146–147):

> Whether appellant, either in the affidavits filed in this court or otherwise, has made such a showing as to entitle him to a hearing in the District Court on the question whether, notwithstanding his failure to appeal directly from the judgment of conviction, he is entitled to a hearing in the District Court on the right he claims to attack collaterally under 28 U.S.C. § 2255 (1958) the validity of the judgment of conviction on the basis of the admission in evidence of an alleged coerced confession.

On rehearing, the majority held that admission of a confession at a plenary trial is not subject to collateral challenge under 28 U.S.C. 2255, and that an exception was not to be afforded upon the basis of

"mere neglect in taking an appeal—excusable or not" (R. 151). The judgment was affirmed (R. 148, 162). Three judges, concurring in part and dissenting in part, considered a remand required to determine the truth of petitioner's alleged excuse for failure to appeal and whether the confessions were involuntary as a matter of law (R. 153).

SUMMARY OF ARGUMENT

I

A. Petitioner's brief is founded upon the oft-repeated statement of this Court that the use of a coerced confession violates due process—without sufficient analysis of the concepts which that general statement embodies. The use of a confession which is in fact coerced undeniably does violate due process, but a defendant's allegation that a confession is coerced does not make it such. Nor is it a violation of due process for a district judge to take testimony on the issue and to find that there is a conflict in the evidence warranting resolution by the jury under the federal rule;[6] and it is certainly not a violation of due process for a jury to resolve issues of credibility against the defendant so as to find that there was no coercion. Where the evidence adduced at a trial shows that the issue of whether a confession was coerced or not depends upon disputed factual issues, as in this case, no violation of due process could be involved in submission of the issues to the

[6] In the federal courts, the judge does not decide for himself whether the confession was in fact voluntary or coerced, but determines only that there is enough evidence for the jury to find it voluntary.

jury. Even on direct review, the question of whether a confession is coerced and therefore constitutionally vulnerable does not call for determination of disputed facts or issues of credibility by the appellate court, but is determined on the basis of the undisputed facts in the record. All disputable issues are resolved by the jury.

B. For this reason, where there is no attack on the fairness of the procedure at the trial, the only issue as to voluntariness which could possibly be open on collateral attack under Section 2255—if any issue is open at all with respect to confessions alleged to be coerced—is whether the trial court committed legal error in permitting the confession to be admitted in evidence and in submitting the issue of voluntariness to the jury. That question is to be decided on the basis of the trial record, and not after a new evidentiary hearing.

This Court has decided, with respect to federal habeas corpus actions challenging the validity of a state conviction on the ground that a coerced confession was used at the trial, that, in the absence of special circumstances, review of the issue of coercion should ordinarily be on the basis of the trial record. Among the factors noted as supporting such a ruling is the tendency of the passage of time to evoke new versions of the facts, and the desirability of having the issue of voluntariness tried in the "whole, living complex of a criminal trial". *Brown* v. *Allen,* 344 U.S. 443, 468, 506; *Rogers* v. *Richmond,* 365 U.S. 534, 547–549. These practical considerations apply to federal as well as state trials. This very case indicates how the fact of conviction and the lapse of time can result

in deliberate or unconscious embellishment of facts, for petitioner's motion under 28 U.S.C. 2255 made allegations of fact going beyond those to which petitioner himself testified at the trial. Particularly in relation to federal trials, where the federal constitutional issues are decided in the first instance by a federal court, there is no need for a new evidentiary hearing under 28 U.S.C. 2255 and a new trial of the facts.

C. Petitioner's motion under 28 U.S.C. 2255, drawn by counsel, was not based on the trial record, but attempted to set forth new facts and to call for a new evidentiary hearing. There was no allegation that the undisputed evidence at the trial showed coercion, and it was not said that there was an absence of evidence from which the judge or jury could find voluntariness. Indeed, the trial record demonstrates conclusively that such allegations could not properly be made. Even petitioner's own testimony at the trial does not establish coercion but supports the inference that he confessed because he knew that his companions had told the whole story and had implicated him. When to petitioner's own testimony there is added the testimony of government witnesses categorically denying any threats, and other evidence contradicting petitioner's statements, it is clear that the trial judge committed no error in permitting the issue of voluntariness to go to the jury. On this basis, we think this case can be disposed of on the simple ground that the files and records conclusively show that this prisoner is entitled to no relief even if the

question of coercion is normally cognizable under Section 2255.

II

A. If the Court finds it necessary to go beyond the point discussed above and reach the general question whether the legal ruling of a federal court that a confession may be admitted into evidence is normally reviewable under 28 U.S.C. 2255—and, for the reasons given in Point I, *supra,* the ruling would only be reviewable on the trial record—it is the government's position that, absent a showing of special circumstances, that decision of law is reviewable only on appeal and not collaterally. There is no reason why a federal trial court acting under Section 2255 should review the ruling on admissibility made by the same federal court at the trial.

It is true that this Court has held that, as to state convictions, collateral attack by way of habeas corpus in the federal courts is available to consider whether (on the trial record) the use by a state of an allegedly coerced confession violates due process. However, if habeas corpus were not available the only federal court which could pass on the voluntariness of the confession would be this Court which is faced with many practical difficulties, described in *Brown* v. *Allen,* 344 U.S. at pp. 489–502, in dealing with such issues on direct review of state convictions. It has therefore been felt, in view of the Congressional intent manifested since 1867 when federal courts were authorized to issue a writ of habeas corpus to prisoners in state custody in violation of the Constitution, that federal habeas cor-

pus should be available to test the use of a confession by state courts.

The situation with respect to the use of a confession at federal trials is different. The trial takes place in a federal forum. The same principles are applied by the courts both at the trial and appeal (on the one hand) and on motion under 28 U.S.C. 2255 (on the other). To permit the admission of the confession to be reviewed under 28 U.S.C. 2255 would be in effect to grant a long delayed petition for rehearing or to permit the motion to vacate to be used as a substitute for an appeal. That would be contrary to established principles in this field which stress the use of the appellate route.

B. Even as to certain issues which go to jurisdiction in the narrow sense of that term, it has been held that a trial ruling should normally be reviewable only by appeal where disputed matters of law are involved. Hence, even if it be said that the admission of a confession is a matter which goes to jurisdiction in the expanding sense in which that term is now often used, it does not follow that the question is cognizable collaterally rather than by direct appeal. On the contrary, the admissibility of a confession is not an issue going to the heart of the authority of the district court to try the criminal case—the fundamental sense of "jurisdiction"—but is an evidentiary problem normally turning on particular facts as viewed in the context of the criminal trial. Under the decisions of this Court, it is peculiarly the type of question which should, absent special circumstances, be reviewable only on appeal.

III

A. We agree that special circumstances may sometimes justify resort to collateral attack even though the issue raised is not one normally cognizable in collateral proceedings. Failure to appeal may possibly be such a circumstance, even where the government is not at fault. However, we do not believe that petitioner has made a sufficient showing to justify treating his case as falling within any such exceptional category.

Since petitioner did not offer any excuse for his failure to take an appeal until the case was in the court of appeals after denial by the district court of his motion under 28 U.S.C. 2255, the issue comes before this Court in an unsatisfactory manner, by affidavit rather than after hearing. Considering the lateness of the affidavits and the fact that counsel would be likely to present the version most favorable to petitioner, we think that the court of appeals was justified in ruling that no purpose would be served by a further evidentiary hearing on the reasons for petitioner's failure to appeal. The present affidavits are too cautiously worded to carry the conviction that failure to appeal was really the result of petitioner's ignorance. Moreover, at most, the allegations amount to the statement that the person to whom petitioner had entrusted the obtaining of trial counsel, his wife, had failed to inform him of the requirement that he obtain new counsel for an appeal. There was at most only "neglect" to take an appeal—neglect, neither by the government nor

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by petitioner's counsel, but by petitioner's wife acting for petitioner. The law cannot so lightly absolve persons from responsibility for the neglect of their own agents.

B. In any event, there is no occasion for a further hearing on the circumstances of petitioner's failure to appeal. Whether review be by direct appeal or by collateral attack, the only question would be—as we have shown—whether on the basis of the undisputed facts in the trial record there was coercion or an absence of evidence of voluntariness. Since, on this trial record, it is so clear that the issue of voluntariness involved conflicting testimony for the jury to resolve, no purpose would be served by a remand to decide whether a collateral challenge may properly be brought because of petitioner's failure to appeal.

ARGUMENT

INTRODUCTION

Since this case presents a particular problem as to the scope of relief cognizable under 28 U.S.C. 2255—a general question of continuing importance in the administration of federal criminal law—it is essential that the precise issues presented by this record and this petition be clearly delineated, at the outset, within the broader framework of collateral challenge to an allegedly coerced confession.

A. Petitioner categorically assumes that a federal criminal conviction is subject to collateral attack upon the ground that it is based upon a coerced confession and therefore asserts that the question is "whether this right collaterally to attack his federal

conviction based on a coerced confession is extinguished by his failure to appeal directly from his conviction" (Br. 2, 12–13). We emphatically disagree. The assertion that a conviction "based on a coerced confession" is subject to "collateral attack" is too broad and too ambiguous to be helpful as a predicate for the analysis of the present case. "[B]ased on a coerced confession" assumes a certainty about both facts and their legal characterization which is utterly unreal. On collateral attack of his conviction the defendant may be presenting any of a variety of situations. At least three sharply distinguishable situations deserve present notice:

(i) The confession may be admittedly or incontrovertibly coerced. This is obviously a rare situation.

(ii) The defendant may be asserting that he was convicted upon a record which shows that as a matter of law (*i.e.*, upon the undisputed evidence), although the question of law is disputed, the confession was coerced. This is the familiar case presented by habeas corpus to review state convictions.

(iii) The defendant may be asserting that, although the issue is disputed, he will introduce evidence at a new hearing proving that the confession used to convict him was in fact coerced. In this situation the facts concerning the confession might or might not have been put in issue at the trial. Normally, as in the present case, this same question of fact will have already been put in issue and resolved against the defendant at his trial, by the judge and jury. He may or may not have exhausted his remedies upon appeal.

Each of these different situations might conceivably be governed by separate rules. We are willing to assume with petitioner that a conviction based upon an admittedly coerced confession may be voided whenever that fact clearly appears. It is our view, however, that in the third situation above the defendant does not show a violation of any constitutional right where the disputed issue of coercion was presented and resolved at the trial under fair procedure. Due process of law is satisfied by a trial procedure which affords the defendant a full and fair opportunity to submit the factual issues concerning his confession to the judge or jury, or both successively, under circumstances such that the confession is excluded from the jury's consideration unless found to be voluntary.

The second, intermediate, situation referred to above presents narrower questions. Although *a priori* it might have been argued that a state satisfied the due process clause of the Fourteenth Amendment if it established a fair procedure for litigating the facts concerning a confession and provided for a fair judicial determination of whether, upon the undisputed or established facts, it was coerced, it is now an established principle of our federalism that a defendant is entitled to have a federal court decide a claim of constitutional right (*i.e.*, whether the proper constitutional standard was applied to the facts). To make this right real in the face of the pressure of business upon this Court, the remedy of habeas corpus in the inferior courts was deemed available in addition to certiorari or appeal. A different question, how-

ever, is presented when the trial was held in a federal court where *ex hypothesi* there is a federal determination of the question of constitutional law.

This question, we submit, need not be decided in the present case. This case falls in the third category; petitioner is seeking to relitigate factual issues concerning his confession which were resolved against him at his trial; no claim is or has been made that the trial procedure was in any way defective or that the instructions to the jury were incorrect; nor is there any claim of newly discovered evidence. Petitioner is simply seeking to retry the issue in a new evidentiary hearing; and that contention must be squarely rejected. In addition, this is not a case in which there can be a fair difference of opinion, on the trial record, as to whether the confession was admissible; it is indisputable that there were controverted factual issues which should properly be sent to the jury and that the trial judge was plainly correct in admitting the confessions and then submitting the question of voluntariness to the jury. Accordingly, the present case can be disposed of on the limited ground that the records and files conclusively prove that petitioner has no cause of action under 28 U.S.C. 2255.

B. Beyond that, if the more general question is reached as to whether, in the absence of extraordinary circumstances, the claim of the use of a coerced confession at a federal trial is cognizable at all by motion under Section 2255, it is the government's view that in the normal situation such an error can be reviewed

only on appeal. We think that, unlike state convictions, collateral review of that issue is not required or appropriate for federal convictions—at least in the absence of special circumstances—even though there is no new evidentiary hearing and the review is based on the trial record. The considerations applicable to federal review of state convictions upon a writ of habeas corpus are quite different from those relevant in deciding whether habeas corpus or a motion under 28 U.S.C. 2255 is available to review a state conviction in a federal court. See pp. 41–43, 47–52, below.

In the narrower aspect of his argument, petitioner contends that, even though the issue of the admissibility of the confessions could not normally be reconsidered in a proceeding under 28 U.S.C. 2255, it should be so reconsidered if petitioner can show that his failure to appeal was excusable. Our position on this point is that a mere showing of excusable neglect is not a reason for rendering that issue, not otherwise cognizable under 28 U.S.C. 2255, properly litigable in such a proceeding. In any event, if it is so cognizable the only relief to which petitioner would be entitled would be the review he would have had on appeal, *i.e.*, a determination of whether, on the trial record, the trial court erred as a matter of law in permitting the confession to be received in evidence and submitting the issue of voluntariness of the jury. As we have indicated, we think that, on this record, it is so clear that the trial judge did not err that there is no need to remand the case for further proceedings under Section 2255, even if the issue is deemed cognizable.

C. Consideration and resolution of this series of issue must be made to fit, not only the pattern of the terms and objectives of Section 2255, but also into the larger context of the proper administration of criminal justice in the federal system. There are, on the one hand, the significant principles that conviction and punishment should not be sustained where violation of constitutional (or other basic rights) is proved, and that due opportunity for such proof should be available. On the other hand are the important contrasting factors that criminal justice should not be unduly delayed, that appropriate finality in litigation is to be encouraged, and that unnecessary relitigation is a public and private drain. Solution of the problems of collateral attack on federal criminal judgments, such as those raised in this case, must take account of these competing values.

I

SINCE THE ADMISSIBILITY OF PETITIONER'S CONFESSION WAS RAISED AND DETERMINED AT THE TRIAL (AS TO WHICH NO CLAIM OF DEFECT IN PROCEDURE IS MADE), AND THE TRIAL COURT'S RULING ON ADMISSIBILITY WAS CLEARLY CORRECT ON THE RECORD MADE AT THE TRIAL, THE ISSUE CANNOT BE RETRIED UNDER 28 U.S.C. 2255

A. *Even on direct review, the question whether a confession is coerced, and therefore constitutionally vulnerable, does not involve resolution of issue of credibility by the appellate court but is determined on the basis of the undisputed facts.*

The issue of the scope of collateral attack on a confession is so bound up with the general principles

governing confessions that it is well to start our discussion with a summary of the rules on the admissibility of confessions at a federal trial and the direct review by appellate courts of the trial rulings thereon.

1. The admissibility of a federal confession is in the first instance a question of law for the court.[1] To determine that issue the trial court is under an obligation, upon request, to hold a hearing outside the presence of the jury at which the defendant may testify specifically on the circumstances surrounding the making of the confession (without necessarily taking the stand at the trial on the issue of guilty or innocence). *United States* v. *Carignan*, 342 U.S. 36, 38. However, in the words of this Court in *Wilson* v. *United States*, 162 U.S. 613, 624, "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant." The judge does not decide for himself whether the confession was in fact voluntary; he decides only that there is enough evidence for the jury to find lack of coercion, and submits that question to the jury. This is the procedure fol-

[1] The question is really a mixed one of law and fact since it involves the application of a general principle to a particular set of facts. However, for the purposes of this brief, it seems easier to characterize the decision of admissibility made by the court as the determination of an issue of law, and we do so throughout.

lowed generally in the federal courts[6] and specifically in the District of Columbia, where this case arose. The Court of Appeals for the District of Columbia Circuit recently stated the applicable principles in *Wright* v. *United States*, 250 F. 2d 4, 13, as follows:

> In this jurisdiction, however, by "law and practice", the court first holds a preliminary hearing for the purpose of determining whether there is evidence from which the jury could properly conclude that the confession was voluntary. If the court concludes there is no such evidence, it must exclude the confession; but if it finds there is evidence on the basis of which it might be held to be voluntary, then the question of voluntariness is submitted to the jury.

See also *McAffee* v. *United States*, 111 F. 2d 199, 200–201 (C.A.D.C.), certiorari denied, 310 U.S. 643. That was the procedure followed at the trial of petitioner's case.

2. Since it is not the function of an appellate court to resolve conflicts in evidence, it necessarily follows that, where the admissibility of a confession is challenged on direct appeal, the question for the appellate court is whether it was an error of law to permit the confession to be received in evidence and (if the issue is raised before the jury) to submit the issue of voluntariness to the jury. In other words, the problem before the appellate court is whether on the *undis-*

[6] *Denny* v. *United States*, 151 F. 2d 828, 833 (C.A. 4), certiorari denied, 327 U.S. 777; *Malaga* v. *United States*, 57 F. 2d 822 (C.A. 1); *Hale* v. *United States*, 25 F. 2d 430, 438 (C.A. 8); *Dyson* v. *United States*, 283 F. 2d 636, 638 (C.A. 9).

puted physical facts the confession was involuntary as a matter of law. Since the issue of coerced confessions has in recent years arisen much more frequently in state than in federal cases, the duty of an appellate court with respect to rulings on confessions has been most explicitly articulated with respect to state trials. For example, in *Lisenba* v. *California,* 314 U.S. 219, 237–238, the Court said:

> Where the claim is that the prisoner's statement has been procured by such means, we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. If the evidence bearing upon the question is uncontradicted, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court; even though, in ruling that the confession was admissible, the very tests were applied in the state court to which we resort to answer the constitutional question.
>
> There are cases, such as this one, *where the evidence as to the methods employed to obtain a confession is conflicting,* and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. *In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.* [Emphasis added.]

These principles, again with relation to a state case, were recently reaffirmed in Mr. Justice Frankfurter's opinion in *Culombe* v. *Connecticut*, 367 U.S. 568, 603–604:*

> The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external, "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative re-creation, largely inferential, of internal, "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.
>
> In a case coming here from the highest court of a State in which review may be had, the first of these phases is definitely determined, normally, by that court. *Determination of what happened requires assessments of the relative credibility of witnesses whose stories, in cases involving claims of coercion, are frequently, if indeed not almost invariably, contradictory. That ascertainment belongs to the trier of facts before whom those witnesses actually appear, subject to whatever corrective powers a State's appellate processes afford.* [Emphasis added.]

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* Mr. Justice Stewart joined in this opinion, and Mr. Justice Harlan, Mr. Justice Clark, and Mr. Justice Whittaker appear to have agreed with the portion of the opinion which we quote. See 367 U.S. at 642.

> This means that all testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat,* necessarily, that we are not to be bound by findings wholly lacking support in evidence. See *Thompson* v. *Louisville,* 362 U.S. 199. Where there are no explicit findings, or in the case of *lacunae* among the findings, the rejection of a federal constitutional claim by state criminal courts applying proper constitutional standards [footnote omitted] resolves all conflicts in testimony bearing on that claim against the criminal defendant. In such instances, we consider only the uncontested portions of the record: the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. * * *

See also *Thomas* v. *Arizona,* 356 U.S. 390, 402–403, pointing out that this Court "time and again" has "refused to consider disputed facts when determining the issue of coercion."

While no opinion of this Court has spelled out the rule in equal detail with respect to federal convictions, the decisions of the Court do show that the same rule is applied to federal as well as state cases. Thus in *Wan* v. *United States,* 266 U.S. 1, 16–17, the opinion indicates that the question before this Court was whether there was an issue "upon which the jury could properly have been required or permitted to pass." And in *McNabb* v. *United States,* 318 U.S. 332, 338–339, fn. 5, the Court, after pointing out that

the "issue of law" which was decided by the trial court in admitting the statements did not become a question of fact foreclosed by the jury's verdict, stated that it was treating as facts "only the testimony offered on behalf of the Government and so much of the petitioner's evidence as is neither contradicted by nor inconsistent with that of the Government." See also *Anderson* v. *United States,* 318 U.S. 350, 351, fn. 1, where the Court stated that it would assume as facts "only the testimony of Government witnesses and so much of the petitioners' evidence as is uncontradicted." And see the decisions of lower courts applying to claims of coerced confessions, at federal trials, the standard laid down by this Court in *Lisenba* v. *California, supra. Dyson* v. *United States,* 283 F. 2d 636, 638 (C.A. 9); *Denny* v. *United States,* 151 F. 2d 828, 833 (C.A. 4), certiorari denied, 327 U.S. 777.

As the *McNabb* decision shows, this Court may, in relation to federal trials, lay down standards of admissibility on non-constitutional grounds which it would not apply to state trials. We may assume that, in scrutinizing the record with respect to a confession, it could question the inferences drawn by a trier of fact very closely, more closely than it might be willing to do in state cases. But with respect to federal as well as state trials, neither this Court nor a court of appeals is in a position to decide disputed issues of fact or to resolve questions of credibility. That necessarily must be determined by the trier of fact. With respect to a confession, as with respect to a verdict of guilt generally, it is not the function of

the appellate court "to weigh the evidence or to determine the credibility of witnesses." *Glasser* v. *United States,* 315 U.S. 60, 80. See also *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 254.

It is in the light of these principles that the general statements of this Court upon which petitioner so heavily relies—to the effect that the use of a coerced confession violates due process—must be considered. Unquestionably, the use of a coerced confession violates due process, but a defendant's mere allegation that a confession is coerced does not make it such. It is not a violation of due process for a district judge to find that there is a conflict in the evidence and it is not a violation of due process for a jury to resolve issues of credibility against a defendant. Hence, where the evidence adduced at the trial shows that the issue of whether a confession was coerced or not depends upon resolution of factual issues, no violation of due process is involved in the submission of the issue to the jury. Only if there was no evidence to support a finding of absence of coercion, or if the *undisputed facts* show coercion as a matter of law, does the admission of a confession constitute a violation of constitutional rights.

B. *Where there is no attack on the fairness of the procedure at the trial, the only issue as to voluntariness which could possibly be open on collateral attack is whether the trial court committed legal error in permitting the confession to be admitted in evidence. No new evidentiary hearing would be required.*

We have pointed out that, even on direct review, an appellate court does not undertake to resolve is-

sues of credibility, but determines the constitutional question involved in the admission of a confession on the basis of undisputed facts. It seems clear to us—and indeed this Court has so decided with respect to state cases—that, if the admissibility of a confession at a federal trial is open to collateral challenge at all (an issue we discuss in Point II, *infra,* pp. 45 *ff*), the only question which could possibly be open would be whether the trial court erred as a matter of law, on the undisputed physical facts, in permitting the confession to go into evidence and the jury to pass on the issue of voluntariness. That question must necessarily be decided on the basis of the trial record, and not after a new evidentiary hearing, in the proceeding under 28 U.S.C. 2255. A different issue would, of course, be presented, if there were a claim that a petitioner had in some respect been denied the opportunity to test the voluntariness of the confession at the trial, but that question is not here since this petitioner does not and cannot make any such claim.

1. One of the few clear principles with respect to the scope of collateral challenge to federal convictions, by habeas corpus or its substitute under 28 U.S.C. 2255, is that it is not the regular function of the remedy to retry issues of fact which have been submitted to and resolved by the jury. See *Harlan* v. *McGourin,* 218 U.S. 442, holding that insufficiency of the evidence to establish guilt was not cognizable on habeas corpus. As this Court pointed out in its discussions of the scope of collateral review, both in *Sunal* v. *Large,* 332 U.S. 174, 177–179,

and *Bowen* v. *Johnston*, 306 U.S. 19, 25, even as to issues which are jurisdictional in the strictest sense of that term, review by habeas corpus has been refused where the question of jurisdiction was determined by the trial court upon the resolution of issues of fact. Thus, as stated in *Bowen*, 306 U.S. at p. 25:

> Where on the face of the record the District Court has jurisdiction of the offense and of the defendant and the defendant contends that on the facts shown the crime was not committed at a place within the jurisdiction of the United States, we have held that the judgment is one for review by the Circuit Court of Appeals in error proceedings and that the writ of habeas corpus is properly refused. *Toy Toy* v. *Hopkins*, 212 U.S. 542, 549. * * *

See also the statement in *Bowen* at p. 27, that courts should not normally exercise the power to re-examine jurisdictional issues on habeas corpus "where there are essential qustions of fact determinable by the trial court."

In accordance with these principles, lower federal courts have held that, even where an issue is raised which, if undetermined, would clearly be cognizable under 28 U.S.C. 2255 (*e.g.*, competency to stand trial), such a question will not be re-examined on motion under 28 U.S.C. 2255 where the trial court did in fact consider the issue and decide it adversely to the defendant. *E.g.*, *Hill* v. *United States*, 223 F. 2d 699 (C.A. 6), certiorari denied, 350 U.S. 867 (competency); *United States* v. *Coleman*, 230 F. 2d 261 (C.A. 3) (use of perjured testimony).

These principles apply to this case. Whether or not *any* issue with respect to the confession is cognizable under 28 U.S.C. 2255, the issues of fact which were tried before the court and submitted to the jury may not be re-examined on the motion. In short, there can in no event be a new evidentiary hearing on the facts—absent a proper claim of newly discovered evidence. The only issue which can be open—if any issue is open at all—is whether, as a matter of law, the court erred, on the trial record, in permitting the confession to go into evidence and in submitting the issue of voluntariness to the jury.

2. This Court has already decided, with respect to federal habeas corpus actions challenging the validity of a state conviction on the ground that a coerced confession was used at the trial, that in the absence of special circumstances review of that issue should ordinarily be on the basis of the trial record. In *Brown* v. *Allen*, 344 U.S. 443, a leading case holding that the state's use of a confession at a trial could be reviewed by habeas corpus in a federal district court, this question was fully discussed under the heading "Right to Plenary Hearing", 344 U.S. at pp. 460–465. The opinion states (at p. 463):

> Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required. * * *

That the issue is one of law (and not one of fact, requiring a new hearing) is also made clear by the

opinion of Mr. Justice Frankfurter in the *Brown* case, 344 U.S. at p. 506:

> When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.
>
> A State determination of the historical facts, the external events that occurred, may have been made after hearing witnesses perhaps no longer available or whose recollection later may have been affected by the passage of time or by the fact that one judicial determination has already been made. To be sure, these considerations argue equally against hearing the claims at all long after the facts took place. But Congress, by making habeas corpus available, has determined that other considerations prevail. We are left to devise appropriate rules, and the congressional determination does not preclude *rules recognizing the soundness of giving great weight to testimony earlier heard*, just as it does not undermine the principle that the burden of proving facts inconsistent with judicial records in all proceedings of this kind is heavy [emphasis added].

See also *Thomas* v. *Arizona*, 356 U.S. 390, 403, and the discussion of the necessity of relying on the state record in the recent decision in *Rogers* v. *Richmond*, 365 U.S. 534, 547–549, where the Court held that, when the state court had applied an improper standard in determining the admissibility of a confession, the question of whether the confession was in fact coerced could not be determined *de novo* in the habeas corpus action. The opinion noted that it would not be fair to the prisoner or the state to have voluntariness determined "in abstraction from the whole, living complex of a criminal trial." 365 U.S. at p. 548.

3. The practical considerations which this Court discussed in *Brown* v. *Allen* and *Rogers* v. *Richmond* as to why a determination of the issue of the admissibility of the confession should normally be based on the trial record apply with equal, if not greater, force to federal proceedings.

(*a*) Since the enactment of 28 U.S.C. 753, providing for the recording of all proceedings in federal criminal cases, it would be a rare case in a federal court where the record was not already in existence or readily available. As to federal trials, there is no longer any real danger (which exists in some state cases) that an adequate transcript of the trial record will not be available to present the issues. And it is important in federal criminal law, as in state, that the admissibility of a confession be determined in the "living complex of a criminal trial." The dangers inherent in the lapse of time, and partial presentations, apply equally to federal as to state prisoners.

This very case indicates how the fact of conviction and the lapse of time can result in deliberate or unconscious embellishment of facts. Petitioner's motion under 28 U.S.C. 2255 made allegations of fact going beyond those to which petitioner himself testified at the trial. Petitioner alleged in his motion that, while held by the Chicago police, he was questioned continuously, beaten physically, and subjected to psychological as well as physical torture, with the result that he made a statement demanded by the Chicago police but refused to sign it (R. 2). His own testimony at the trial concerning the "continuous" questioning—assuming that it was believed by either the court or jury—cited four questionings by Chicago police, none exceeding 30 or 45 minutes. His testimony before the judge adduced three appearances in lineups, one during the night (in the testimony before the jury, four lineups, two at night), none of the lineups involving unduly bright lights or any questioning. As to physical beatings, petitioner had testified before the trial judge that the Chicago police "[r]oughed me up a little bit" (R. 72), but he presented no such testimony before the jury. And, in contrast with the allegation in his motion under Section 2255 that he made a statement to the Chicago police which he refused to sign, his testimony at the trial was that he at no time admitted the robbery to the Chicago police (R. 71, 79). Petitioner also alleged in his motion that when the Washington police arrived in Chicago to take him back to Washington they "demanded a confession from defendant under threat of

handing him back over to the Chicago police for further mistreatment and abuse. Whereupon, defendant signed an alleged confession, waived extradition and was returned * * *" (R. 2). This statement ignores petitioner's own testimony at the trial that he had waived extradition *a day before* the alleged threat—and before the Washington police arrived in Chicago—in a formal hearing before the Chief Justice of the Municipal Court. The statement also ignores the whole impact of petitioner's testimony at the trial that he had at no time made any statement to the Chicago police and that, in point of time, his confession to the Washington police had occurred *after* those officers showed him his brother's and Stramer's confessions (R. 73).

This case is thus an illustration of the need for "rules recognizing the soundness of giving great weight to testimony earlier heard" (opinion of Justice Frankfurter in *Brown* v. *Allen*, 344 U.S. at p. 506). Considering how fully the disputed issues were canvassed at the trial, there would be no occasion for a new evidentiary hearing to resolve, separately from and subsequent to the trial, disputed issues of fact as to the circumstances of the confession.

(*b*) In addition, there is a special reason why a new evidentiary hearing on the voluntariness of a confession should not be held under 28 U.S.C. 2255 with respect to federal criminal convictions—whatever the procedure may be in federal habeas corpus proceedings attacking state convictions. The critical difference is that in a federal criminal trial federal consti-

tutional issues are decided in the first instance by a federal court, and the ruling is subject to direct review within the federal system. In state cases the initial rulings under the federal constitution are by state courts, and (except for federal habeas corpus) review by a federal tribunal can be had only in this Court on certiorari or appeal. As shown by the federal habeas corpus statute itself (28 U.S.C. 2241(3)) as well as by the successive statutes on the jurisdiction of this Court over state cases, there has for many decades been a strong feeling that final resolution of federal constitutional rights in criminal matters should not be left to the state courts—which may not apply the same constitutional rules as those established by this Court and the lower federal courts. At the same time, the Court has recognized that its direct appellate jurisdiction over state criminal cases cannot by itself—in view of the heavy burden the Court bears—adequately vindicate constitutional rights in state cases. See *Brown* v. *Allen*, 344 U.S. 443, 491–497; *Darr* v. *Burford*, 339 U.S. 200. The habeas corpus remedy of 28 U.S.C. 2241 is needed so that federal tribunals can consider and decide such constitutional claims.

But with respect to federal criminal trials the function of deciding these constitutional issues is initially placed in a federal tribunal; if a conviction is had, there is review as of right by an intermediate federal tribunal, the court of appeals; and if the case comes here on a petition for certiorari, there is greater opportunity for consideration by this Court of a constitutional claim than in the state cases (especially in

view of the greater number of state criminal cases). The coordinated steps of direct review within the federal system are more likely to expose and evaluate a substantial constitutional claim. See also *infra*, pp. 49–52.

C. *Since petitioner's motion under Section 2255, drawn by counsel, was not based on the trial record and since that record clearly shows that there was evidence of voluntariness to go to the jury, this case may be disposed of on the ground that on its face the motion does not state a cause of action.*

Under the principles we have discussed (*supra*, pp. 27–43), we think this case can be disposed of on the simple ground that petitioner's motion under 28 U.S.C. 2255 fails, on its face, to state a claim on which relief may be granted, or, to put it another way, that "the files and records of the case conclusively show that the prisoner is entitled to no relief" (*supra*, p. 3). The motion, drawn not by a layman, but by counsel, is plainly deficient. Petitioner has not relied on the trial record but has attempted to allege new facts; he has not alleged that the undisputed evidence at his trial showed coercion; and he has not asserted that there was no evidence from which a judge or jury could find voluntariness.

Moreover, the trial record demonstrates that in fact such allegations could not properly be made.[10] The trial testimony set forth in the Statement, *supra*, pp. 4–9, does not show coercion even on petitioner's own

[10] Petitioner's motion under Section 2255 in effect incorporates the trial record (R. 3).

testimony. While he said before the judge that the Chicago police "roughed" him up a bit, he did not even repeat that allegation before the jury. According to his own testimony at the trial, he was not continuously questioned but was questioned four times, at no time exceeding 30 to 45 minutes, and he made three or four appearances at a lineup where he was not questioned. While he was held in Chicago from the time of arrest on April 29 until the Washington police arrived and were able to make reservations to return on May 3, he was taken on May 1 before the Chief Justice of the Municipal Court where he voluntarily waived extradition and, pending arrival of Washington police, was placed in the custody of the Sheriff of Cook County.[11] He made no statement to the Chicago police. His confession to the Washington police was made only after he was confronted with the statements of his companions. He was admittedly well treated by the Washington police and he repeated his confession in Washington in front of the victim of the robbery. Thus, on petitioner's own testimony, the court and jury could reasonably find that the confession was the result, not of coercion, but of petitioner's knowledge that his companions had told the true story. Cf. *Stein* v. *New York,* 346 U.S. 156, 186. When to petitioner's own testimony there is added the testimony of the Washington officers cate-

[11] Obviously a suspect in an armed holdup case, apprehended with a revolver and ammunition for a second revolver in his possession, could not be left to roam the streets while awaiting the arrival of police from another city to take him back. Petitioner made no move for release on bail, as he was willing to await return to Washington.

gorically denying any threat to petitioner and the testimony of the Chicago arresting officer that the arrest was peaceably made and that from the start petitioner agreed to return to Washington, it is clear that the trial judge committed no error in permitting the issue of voluntariness to go the jury.

That is as far as we think this Court needs to go in this case. However, since the general issues which petitioner raises—whether a claim of coercion is normally cognizable under 28 U.S.C. 2255, or whether the specific allegations as to lack of information as to the right to appeal make it so cognizable—are encompassed by the grant of certiorari, we set forth our views on those more general points.

II

ABSENT SOME SHOWING OF SPECIAL CIRCUMSTANCES, THE DECISION OF A FEDERAL COURT THAT A CONFESSION MAY BE ADMITTED INTO EVIDENCE IS REVIEWABLE ONLY ON APPEAL AND NOT BY MOTION UNDER 28 U.S.C. 2255

The logic of petitioner's argument, in its broader aspect, seems to be that, even if he had appealed his conviction and the admissibility of the confession had been sustained on appeal, he could still by motion under 28 U.S.C. 2255 attack the admission of his confession and obtain a new evidentiary hearing. There is little to support this position. *First*, the general scope of relief under Section 2255 from a conviction based on an allegedly coerced confession, if relief is available at all, would necessarily be narrower than petitioner recognizes. As we have shown in Point I,

supra, where no claim is or can be made that there was any defect in the trial procedure, the question of the cognizability under Section 2255 of a claim of the use of a coerced confession is merely this: whether, on motion under 28 U.S.C. 2255, the district court should reconsider its previous ruling of law that on the trial record there was sufficient evidence of voluntariness to permit the confession to be received in evidence and the issue to go to the jury. *Second,* although this Court has held that such an issue of law may be reviewed as to state convictions by a federal habeas corpus action (which necessarily lies in a court different from that of the trial), the very considerations which support collateral review of state judgments in that situation militate against permitting such review by federal courts of federal judgments (in the absence of a showing of extraordinary circumstances). Since, as to federal judgments, the same principles are applied by the same courts, both at the trial and on appeal (on the one hand) and on motion under 28 U.S.C. 2255 (on the other), to permit the admission of the confession to be reviewed by motion under 28 U.S.C. 2255 would in effect be to permit a long delayed petition for rehearing or to permit Section 2255 to be used as a substitute for appeal.

A. *There is no reason why a federal trial court acting under Section 2255 should review the ruling on admissibility made by the federal trial court at the trial.*

1. We have shown in Point I, *supra,* pp. 27 *ff,* that even if a collateral challenge to the admission of a confession were allowable, the Section 2255 court

would consider the issue on the basis of the undisputed and undisputable parts of the trial record and would not order a new contest of the facts (except, perhaps, where the prior hearing on the issue had not been procedurally fair or newly discovered evidence was proffered). The question remains whether, even on this limited basis, collateral attack should be permitted in federal criminal cases, as petitioner claims, whether or not an appeal from the conviction was prosecuted.

2. It is now established by the decisions of this Court that, as to *state* convictions, collateral attack by way of habeas corpus in the federal courts is available to consider whether the use by a state of a coerced confession violated due process. *Reck* v. *Pate*, 367 U.S. 433; *Rogers* v. *Richmond*, 365 U.S. 534; *Irvin* v. *Dowd*, 359 U.S. 394; *Thomas* v. *Arizona*, 356 U.S. 390; *Leyra* v. *Denno*, 347 U.S. 556; *Brown* v. *Allen*, 344 U.S. 443. The specific holding of these cases is that the federal court (normally on the basis of the trial record) must make its own determination as to whether, on the undisputed facts, there was a showing of coercion or there was no evidence to support a finding of voluntariness.

We do not believe that the transition is as easy as petitioner seems to think from these rulings with respect to state convictions to the conclusion that federal courts must also reexamine—by the federal substitute for habeas corpus, a motion under 28 U.S.C. 2255—the use of a confession at a federal trial, even in the limited degree to which that review relates in state cases, *i.e.*, whether on the undisputed facts it

was error to permit the confession to be admitted in evidence.

The claim of coercion (as distinguished from undue delay in arraignment) has been in recent years so rare in federal courts that this Court has not heretofore had occasion to pass on the question. The one older decision of the Court on habeas corpus that can be said to have any direct bearing on the issue is contrary to petitioner's position that all constitutional issues are open under Section 2255. In *Matter of Moran*, 203 U.S. 96, 105, this Court held that a complaint that the petitioner was compelled to be a witness against himself by being forced to stand up and walk before the jury—a constitutional claim—was not an issue cognizable on habeas corpus, saying—

> If this was an error, as to which we express no opinion, it did not go to the jurisdiction of the Court.

Certainly, the lower federal courts have not been of the view that the rulings with respect to habeas corpus review of state convictions necessarily extend to collateral attack on federal convictions, either by habeas corpus or by motion under 28 U.S.C. 2255. They have consistently held that the claim that a coerced confession was used is not an issue which is cognizable collaterally.[12]

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[12] *Smith* v. *United States*, 187 F. 2d 192, 194 (C.A. D.C.), certiorari denied, 341 U.S. 927 (in which "coercion and duress" was alleged, not merely unlawful detention); *Eury* v. *Huff*, 146 F. 2d 17 (C.A. D.C.) ("subjected to constant physical and mental pain"); *Cash* v. *Huff*, 142 F. 2d 60 (C.A. 4), certiorari denied, 323 U.S. 747 (confession "extorted"); *Mil-*

As we have indicated in Point I, *supra*, pp. 41–43, the important considerations supporting review on federal habeas corpus of the use of confessions by state courts do not apply to federal judgments. It has long been established that the use of such a confession is a violation of a right protected by the United States Constitution. And while, of course, state courts are governed by the Constitution, experience has shown that, in interpreting the constitutional right, state courts do not always apply the same standards as the federal courts. On direct review of a state conviction, the only federal court which can pass on the constitutional question is this Court. The difficulties which this Court encounters in passing on such questions on petitions for writs of certiorari to review decisions of the highest court

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ler v. *Hiatt*, 141 F. 2d 690, 691 (C.A. 3), ("threats and intimidation"); *Burall* v. *Johnson*, 134 F. 2d 614 (C.A. 9) ("duress, threats, and promises"); *Yodock* v. *United States*, 97 F. Supp. 307, 310–311 (M.D. Pa.) ("questioned day and night", officer "invented a phony confession"); *United States* v. *Kranz*, 86 F. Supp. 776, 777 (D. N.J.) ("coerced confession"). And see *Davilman* v. *United States*, 180 F. 2d 284, 286 (C.A. 6), and *Stegall* v. *United States*, 153 F. Supp. 844, 847 (W.D. Ky.), affirmed, 259 F. 2d 83 (C.A. 6), certiorari denied, 358 U.S. 886 (involving admission of confession of a co-defendant); *United States* v. *Edwards*, 152 F. Supp. 179 (D. D.C.), affirmed, 256 F. 2d 707 (C.A. D.C.), certiorari denied, 358 U.S. 847; *United States* v. *Lowrey*, 84 F. Supp. 804, 807 (W.D. Pa.), affirmed, 179 F. 2d 964 (C.A. 3), certiorari denied, 339 U.S. 969.

Petitioner argues that a number of these cases did not charge coercion, but illegal detention under the *McNabb-Mallory* rule (Pet. Br. 23, fn. 14). But, as appears from the quotations we give in the preceding part of this footnote, there were allegations of coercion in addition to possible claims of mere illegal detention.

of a state have been described in *Brown* v. *Allen*, 344 U.S. at pp. 489–502. If a denial of certiorari by this Court concluded all issues with respect to the admission of the confession, there would, in many cases, be no substantial federal review. Such a result, this Court indicated in *Brown* v. *Allen*, would be inconsistent with the Congressional intent manifested since 1867 when federal courts were authorized to issue a writ of habeas corpus to prisoners in state custody in violation of the Constitution of the United States.

The situation with respect to the use of a confession at federal trials is quite different. The same standards of interpretation of the constitutionally-protected right govern the action of all federal district courts and all federal courts of appeals. That federal standard is directly applied at the trial and on direct review. That same standard necessarily would be applied if the issue were deemed cognizable on collateral attack, either by habeas corpus or 28 U.S.C. 2255. Hence, in the case where the admissibility of the confession is determined by the trial court and reviewed on direct appeal, reconsideration of the issue would often be, in effect, a delayed reconsideration of a prior decision. When habeas corpus was the remedy, it would require a district court to reconsider an issue already determined by a court of appeals in the same or another circuit and the court of appeals (on appeal in the habeas corpus proceeding) to review an issue which conceivably might even have been decided by this Court. Under the present procedure by motion under 28 U.S.C. 2255, the very same district court

and the very same court of appeals would be required (on the same record) to reconsider their prior decisions, again whether or not reviewed by this Court. Except perhaps in the situation where there has been a change in the applicable law—and there has been none as to the principles governing coerced confessions—it is difficult to conceive how a general opening of this issue to review on 28 U.S.C. 2255 could serve any real purpose other than to increase the already large number of frivolous motions under 28 U.S.C. 2255.

Since this petitioner claims that his right to appeal was frustrated (an issue we discuss *infra*), the problem of this particular case may be different. But the repetitious and useless litigation that could ensue indicates, we think, the invalidity of the categorical assumption which petitioner makes (on the basis of cases involving state convictions) that "a criminal conviction is subject to collateral attack if the conviction was based an a coerced confession (Pet. Br. 12)." To the contrary, it seems to us that the very reason which supports review by habeas corpus of state convictions—the necessity of having a procedure whereby a federal court will apply federal interpretation of the constitutional standard to state trials—shows that there is no necessity for such review as to federal criminal convictions. We think this Court so recognized in *Sunal* v. *Large*, 332 U.S. 174, 178, when it said:

> We put to one side comparable problems respecting the use of *habeas corpus* in the federal courts to challenge convictions obtained

in the state courts. See *New York* v. *Eno*, 155 U.S. 89; *Tinsley* v. *Anderson*, 171 U.S. 101, 104–105; *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13; *Ex parte Hawk*, 321 U.S. 114, 116–117. So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal.

B. *Disputed rulings of law like the admissibility of a confession must normally be reviewed on direct appeal and not by habeas corpus or its statutory substitute.*

An issue such as the admission of an allegedly coerced confession should normally be tested on direct appeal and not collaterally under Section 2255. We have discussed (*supra*, pp. 35–37) the authorities which hold that a court will not, on collateral attack by motion under 28 U.S.C. 2255 or habeas corpus, normally re-examine issues of fact which were considered and resolved at the trial. The same principle has been applied, although less absolutely and less clearly, to issues of law, and we believe that it should govern the question of admissibility.

We recognize that there are some issues which are deemed so directly at the heart of jurisdiction that they are reviewable on motion under 28 U.S.C. 2255 even though they have or could have been raised at the trial and have or could have been raised on appeal. See *Bowen* v. *Johnston*, 306 U.S. 19, 27; *Sunal* v. *Large*, 332 U.S. 174, 178. This we think is the explanation of *Jordan* v. *United States*, 352 U.S. 904,

upon which petitioner so heavily relies (Pet. Br. 10, 16–18). The lack of a speedy trial (a nine year delay between indictment and trial) could be deemed to vitiate the entire trial and in that sense was truly jurisdictional.

But with respect to other so-called jurisdictional or constitutional claims this Court pointed out in *Sunal*, 332 U.S. at p. 179:

> Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, *habeas corpus* is increasingly denied in case an appellate procedure was available for correction of the error. * * *

And again in *Bowen* v. *Johnston*, 306 U.S. at pp. 26–27, the Court suggested that even as to jurisdictional issues "[t]he rule requiring resort to appellate procedure" has "special application" not only where there are issues of fact, but also "to the determination in ordinary cases of disputed matters of law".

We think that the admissibility of an allegedly coerced confession presents such a "disputed matter of law". Even if it be said that the admission of a confession at the trial is a matter which goes to jurisdiction in the expanding sense in which the term is now often used, it does not follow that the issue can be raised collaterally rather than by direct appeal. This is not an issue going to the heart of the authority of the district court to try the criminal case at all. Rather it is an evidentiary problem normally turning

on the particular facts, especially as they are viewed in the context of the entire trial. Just as the issue of whether a court does or does not have jurisdiction over a crime may involve resolution of conflicting facts and disputed issues of law, the question of whether or not a constitutional right has or has not been violated by admission of a confession involves similar considerations. While the standard as to a coerced confession is clear enough, the issue of admissibility which we have called an issue of law, involving the application of that standard to particular facts, is often far from simple, even on undisputed facts. Arising as it does in the complex of a criminal trial, it is peculiarly the type of question of law which, even if deemed jurisdictional, should under the decisions of this Court be normally held reviewable only on appeal from the conviction and not by a motion under 28 U.S.C. 2255.

Petitioner relies upon the language in the *Sunal* opinion that the writ of habeas corpus has been held available "where the trial or sentence by a federal court violated specific constitutional guarantees" (Pet. Br. 15); and Section 2255 refers to a sentence "imposed in violation of the Constitution" (*supra*, p. 2). But it is plainly not enough to bring Section 2255 into operation merely to allege the transgression of a constitutional right. A conviction based on wholly insubstantial evidence can be characterized as a denial of due process (see *Thompson* v. *Louisville*, 362 U.S. 199), but surely a Section 2255 court cannot be asked

to review the sufficiency of the evidence to support a federal conviction. See *Harlan* v. *McGourin*, 218 U.S. 442 (discussed *supra*, p. 35). Many other types of serious errors in criminal cases can be phrased in constitutional terms. In *Sunal*, where the defendant was not allowed to put in a defense which under later decisions of this Court might have defeated conviction, the claim of error could have been, and in fact was, couched in terms of a denial of the constitutional right to defend oneself. Moreover, Section 2255 also refers to a sentence imposed in violation of the "laws of United States", but it could hardly be maintained that every trial error contravening a federal statute or rule of criminal or civil procedure is cognizable under Section 2255.

The significant factor is, not the characterization of the claim as founded on the Constitution or laws, but the kind of issue actually involved. Sufficiency of the evidence is for the appellate courts alone, no matter what label the claimed error is given. The same is true, we submit, of the admissibility of a confession. For the reasons we have given above, that is the kind of question which should normally be scrutinized only on direct appeal and not by collateral attack.

The opinions in *Sunal* v. *Large* and *Bowen* v. *Johnston* caution against any attempt to formulate rigid principles with respect to the scope of review by habeas corpus (now by motion under 28 U.S.C. 2255). We do not attempt to do so. We do not

suggest that never, under any conceivable set of circumstances, may the admission of a federal confession at a federal criminal trial be the subject of review under 28 U.S.C. 2255. We do urge, however, that it should take a considerable showing of special circumstances to permit the question to be open for reconsideration collaterally. Not only is a federal defendant surrounded with the safeguards stemming from the absolute right to counsel (unless waived), but recent decisions of this Court (*e.g.*, *Johnson* v. *United States*, 352 U.S. 565) have extended to the most indigent of defendants the possibility of direct review. Under these circumstances, it would not be in the interest of justice to extend the normal scope of collateral review to such matters, which not only could have been but actually were in issue at the trial. The defendant has been accorded a fair opportunity to present his claim, and there is no need for further repetitious litigation delaying the final termination of the criminal case.

The question of whether, in the particular circumstances alleged by petitioner, the failure to appeal in this case is the type of special situation which would justify the reconsideration of the issue of the admissibility under 28 U.S.C. 2255 is a separate problem which we discuss *infra*, p. 57 *ff*. Our point here is that, in the normal situation, where the admissibility of the confession has been raised and determined at the trial, the decision as to admissibility should not be reconsidered under 28 U.S.C. 2255.

III

PETITIONER'S SHOWING AS TO HIS REASONS FOR FAILING TO APPEAL DO NOT JUSTIFY CONSIDERATION OF THE ISSUE OF ADMISSIBILITY ON COLLATERAL ATTACK AND IN ANY EVENT DO NOT JUSTIFY A NEW HEARING ON THE FACTS

A. *Petitioner's factual showing as to his reason for failing to appeal does not justify the use of collateral review in place of direct review.*

As we have noted, special circumstances may sometimes justify resort to collateral attack to achieve fundamental justice even though the issue raised is not one normally cognizable in collateral proceedings. We can conceive of cases where the failure to appeal can be the kind of special circumstance justifying reconsideration of the admissibility of a confession under 28 U.S.C. 2255 in order that a defendant may have the appellate review of that issue of which his failure to appeal deprived him. Unquestionably that would be true if the failure to appeal were due to some misconduct by the government. Relief may also be available, even where the government is not at fault, under other circumstances such as misinformation by the court or court attaches. It is petitioner's claim that he has made such a showing of ignorance of his right to appeal that his case should be deemed to fall in that category. We do not agree.

1. The issue comes before this Court in an unsatisfactory manner. Petitioner's original motion under 28 U.S.C. 2255, filed by counsel on August 20, 1957, did not include any allegation of lack of knowledge of

the time limit for appeal (R. 1–3). Despite the government's opposition pointing out that the motion stated no basis for collateral challenge, at the hearing (on October 25, 1957) petitioner's attorney apparently did not raise the present excuse, for neither the judge's findings of fact nor his conclusions of law adverted to any such claim of ignorance of the right to review. The affidavits presenting the claim of lack of knowledge (R. 12–16) were not filed until 1959 in the Court of Appeals. Since orderly procedure requires that contentions not raised in the trial court should not normally be considered upon appeal,[13] the court of appeals would have been justified in declining to accept, at the appellate level, a new ground for relief neither alleged nor tried below. However, since the issue was considered by the court below *en banc,* on the basis of the belated affidavits, the question is here to the extent that it is necessary to consider whether petitioner has made a sufficient showing to justify a hearing to determine whether his reasons for failure to appeal would justify reconsideration of the admission of the confession by motion under 28 U.S.C. 2255.

2. In judging the sufficiency of the allegations as to the reasons for petitioner's failure to appeal, there are certain background facts that should be noted. One is the time at which the claim of lack of knowledge was advanced—not immediately after the appeal period had elapsed, but over two years later, after a

[13] *Plummer* v. *United States*, 260 F. 2d 729, 730 (C.A.D.C.); *Walker* v. *United States*, 218 F. 2d 80, 81 (C.A. 7); *Way* v. *United States*, 276 F. 2d 912 (C.A. 10).

motion under 28 U.S.C. 2255 had been denied and appealed. Another is the fact that, long before petitioner went to trial, he had pleaded guilty, and in the subsequent interval between August 30, 1956, the date of that plea, and February 7, 1957, he produced two *pro se* proceedings for the setting aside of his sentence; he was not entirely ignorant of criminal procedure or of his rights. Moreover, while the affidavits alleged that petitioner was taken out of the courtroom immediately after sentence on May 3, 1957, the verdict of guilty was rendered 18 days before, on April 15, 1957.

In the light of these facts the present affidavits are too cautiously worded to carry the conviction that failure to appeal was really the result of petitioner's ignorance. Neither petitioner nor his trial attorneys asserted in their affidavits that petitioner did not know of the right to appeal. Petitioner's affidavit stated only that he did not "recall" having any conversation concerning the taking of an appeal with the two, named, attorneys who represented him at the trial, and it is clear that, particularly during the interval between the verdict and the sentencing, petitioner could have learned of his right to appeal from a number of sources. Nor was it alleged in the affidavits that petitioner did not know that a time limit existed. All that was alleged was that he did not know the exact length of that time limit.

In addition, petitioner's trial attorneys stated in their affidavit that they had recommended an appeal to his wife after petitioner left the courtroom and that she had indicated that she would "discuss it

with her husband" and would suggest that he request court appointment of counsel. No affidavit of the wife was presented and petitioner stated that he no longer knew her address or occupation (R. 15, 16).[14] The affidavit of the attorneys shows that petitioner's wife was the proper representative of petitioner with whom to discuss the appeal, for it was she who had requested the attorneys to defend petitioner. At most, petitioner's allegations amount to the statement that the person to whom petitioner had entrusted the obtaining of trial counsel—his wife—had failed to inform him of the requirement that he obtain new counsel for an appeal. There was thus, at most, only "neglect" to take an appeal—neglect, neither by the government nor by petitioner's counsel, but by petitioner's wife acting for petitioner.

We submit that the law cannot lightly absolve persons from responsibility for such neglect. It is true that laymen must place reliance upon others in court proceedings, but the law cannot safely encourage irresponsibility by according an absolution to neglect of this type. Petitioner allowed his wife to conduct the dealings with counsel, at least with respect to obtaining appellate counsel. On his own version of the events, there is no showing that he did anything about following up the trial proceedings, or that he made any inquiry. As was stated by this Court in the much more severe case of *Felts* v. *Murphy*, 201 U.S. 123, 130 (where the defendant failed to object

[14] Petitioner is apparently now aware of his wife's address. See Pet. Br. 9, fn. 5.

at the trial with reference to his inability to hear), petitioner "made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law".

The court of appeals, in determining whether a remand should be had, was confronted with affidavits that were patently inadequate even though they had manifestly been prepared by new appellate counsel for petitioner and could be expected to state the most favorable version of what could be proved on remand. The court was thus well justified in its conclusion that no further inquiry was warranted. If on the basis of the showing here a hearing were required, every convicted defendant who did not appeal could subject the courts at a later time to the necessity of a hearing on the issue of what the defendant's attorneys or emissaries told him and what instructions the defendant gave his attorneys or emissaries. See, *e.g.*, *Lewis and Simms* v. *United States*, C.A.D.C., pending on petition for writ of certiorari, No. 243 Misc., this Term, where one defendant's counsel had discussed appeal with him and the other defendant's counsel had concluded that there was no basis for successful appeal. We think something more must be shown than was shown here. Intentional betrayal by counsel or total abandonment of representation need not be countenanced, but the ordinary human frailties and errors of the defendant's representative must be the responsibility of the principal who chooses his agents.

B. *Since the trial record clearly shows that petitioner is not entitled to relief, there is in any event no occasion for a hearing on the reasons for petitioner's failure to appeal.*

Moreover, regardless of the considerations discussed immediately above, for the reasons given in Point I, *supra*, pp. 27–45, there is no occasion for a further hearing in this case. Whether review be by appeal or by collateral attack, the only question for review is whether, on the basis of the undisputed facts in the trial record, there was coercion or whether there was an absence of evidence from which a judge or jury could find voluntariness. In other words, the issue is whether the judge erred in submitting the issue of voluntariness to the jury. Since, on the trial record, it is so clear that the issue of voluntariness was at the most one for resolution on conflicting testimony, no purpose would be served by a remand.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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